

1-2008

## Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State

Arthur Meirson

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

Arthur Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431 (2008).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol60/iss2/9](https://repository.uchastings.edu/hastings_law_journal/vol60/iss2/9)

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

## Notes

# Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State

ARTHUR MEIRSON\*

Mary Goulios' niece, Lea Henry, embezzled tens of thousands of dollars from her aunt.<sup>1</sup> When Goulios threatened to report her niece, Henry attacked Goulios, stuffed a Clorox-soaked rag in her mouth, and poured a bottle of bleach over her.

....

Doctors and the police feared [Goulios] would die. She was bleeding from the head, her eyes were swollen shut, and her mouth was swollen and bleeding. She had chemical burns to her head, eyes, mouth, throat, neck, arms, back, legs, and feet.

She remained unconscious, in critical condition, for four days.<sup>2</sup>

What makes Goulios' story unique, however, is not the heinousness of the attack, though certainly it was heinous. Rather, Goulios, a seventy year old woman from Rhode Island, testified against her niece, and saw to it that Henry received a six-year conviction for the assault.<sup>3</sup> "The [Rhode Island] Department of Elderly Affairs receives about 900 complaints of an elderly person being abused each year[.]" and while case workers substantiate 85% of these complaints, only about seventy cases get fully investigated by the police.<sup>4</sup> Of those investigated cases,

---

\* J.D. Candidate, University of California, Hastings College of the Law, 2009; B.A., Rutgers, The State University of New Jersey, 2005. The Author would like to give thanks to Assistant District Attorney A. Alan Kennedy for his help, mentorship, and guidance. and special thanks to his family for their love and support throughout the years. The Author would also like to thank the *Hastings Law Journal* editorial staff for all of their hard work and invaluable support.

1. Tracy Breton, *Elderly Aunt Gets Justice; Niece Faces Jail for Attack*, PROVIDENCE SUNDAY J., Apr. 9, 2006, at A.01, available at <http://www.projo.com/extra/2007/elderabuse/content/20060409.html>.

2. *Id.*

3. *Id.*

4. *Id.*

fewer than twenty result in criminal charges, and "few, if any, ever result in conviction."<sup>5</sup>

### INTRODUCTION

Because elder adults are a uniquely vulnerable population, they should be specially and broadly protected by the penal codes of the several states. These laws should include both objective and subjective grounds for prosecuting perpetrators of elder abuse. California law could represent the gold standard for such laws, so long as a glaring deficiency is corrected. California's law was enacted specifically to address the special conditions surrounding elder abuse.<sup>6</sup> The failing of California's elder abuse law is its focus on the subjective experience of the elder victim. California Penal Code sections 368(b)(1) and 368(c) state, in pertinent part, that "[a]ny person who knows or reasonably should know that a person is an elder or dependent adult and who . . . willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon *unjustifiable physical pain or mental suffering*" is punishable.<sup>7</sup> Apart from the caretaker abuse context, these sections exclude objective analysis of the mistreatment, focusing instead on whether the infliction caused is unjustifiable physical pain or mental suffering.<sup>8</sup> This is problematic because of the nature of the victims the law is intended to protect.

Most elders do not report abuse due to shame, stoicism, recalcitrance, diminished mental faculties, or due to their reliance on their abusers. Even when abuse is detected and reported by third parties, such as doctors or agents of Adult Protective Services, many elders refuse to cooperate with prosecutors. All states and the District of Columbia address elder abuse in some manner. Among these jurisdictions, California arguably provides the most specialized treatment of elder abuse. Yet, because California's elder abuse law does not provide an alternative objective element for prosecuting elder abuse, it does not go far enough. Therefore, without an elder abuse victim's testimony and participation in the prosecution, it is possible for the perpetrator of the abuse to escape a criminal conviction because the prosecution might not be able to prove every element of the crime; that

---

5. *Id.*

6. See CAL. PENAL CODE § 368(a)-(k) (West 1999 & Supp. 2009).

7. *Id.* § 368(b)(1), (c) (emphasis added). The difference between these subsections stems from the condition under which the abuse occurs: section 368(b)(1) (felony elder abuse) applies "under circumstances or conditions likely to produce great bodily harm or death," while section 368(c) (misdemeanor elder abuse) applies "under circumstances or conditions *other than those* likely to produce great bodily harm or death." *Id.* (emphasis added).

8. *Id.* Courts have found that the California elder abuse law is intentionally vague in order to protect vulnerable adults, and that the vagueness is constitutional even if it limits physicians' practice. See *infra* notes 104-11 and accompanying text. Additionally, courts have found that the use of "care" in this statute is not unconstitutionally vague. See *infra* note 101 and accompanying text.

is, that the perpetrator inflicted *unjustifiable physical pain or mental suffering* upon the elder victim.

This Note calls for the addition of an objective alternative element to Penal Code sections 368(b)(1) and 368(c) in order to create parity between the prosecution of caretaker and noncaretaker abusers of the elderly. The change would allow the prosecution to prove its case by focusing on the objective injury rather than on the elder victim's subjective experience of the injury. This change would not only add greater protection to a vulnerable and often silent class of victims, it would also more closely align California's elder abuse law with the legislature's intent. Once California's elder abuse law is amended to correct this critical shortcoming, it could be applied nationwide as the definitive standard for prosecuting elder abuse.

Part I of this Note illustrates why elders, as a class, deserve heightened protection. Part II examines the history of elder abuse legislation. Part III provides a national survey of elder abuse laws in all fifty states and the District of Columbia. Part IV focuses specifically on California's elder abuse law, and identifies its strengths and weaknesses. Part V illustrates the need for enhanced legislation through a variety of case studies. And finally, Part VI proposes amendments to California's existing elder abuse law that would add an objective alternative element, and would allow California to set the gold standard for protecting the elderly.

## I. ELDERS NEED SPECIAL PROTECTION

Elder adults are a uniquely vulnerable community. In fact, the California legislature announced this finding in the first section of California's elder abuse law:

The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection . . . because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.<sup>9</sup>

America is graying, and issues of elder abuse that are not resolved soon will sky rocket within the next few decades. According to the United States Census Bureau, in 2003, 35.9 million Americans were elderly (aged sixty-five or older), representing 12% of the total population.<sup>10</sup> Among these elderly Americans, 18.3 million were aged sixty-five to seventy-four, 12.9 million were aged seventy-five to eighty-four, and 4.7

---

9. CAL. PENAL CODE § 368(a).

10. WAN HE ET AL., U.S. CENSUS BUREAU, PUBL'N NO. P23-209, 65+ IN THE UNITED STATES: 2005, at 1 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

million were eighty-five or older.<sup>11</sup> American elderly growth rates are estimated to increase dramatically between 2010 to 2030 as the Baby Boomer generation ages into the sixty-five-and-over group.<sup>12</sup> By 2030, the elderly population is projected to double 2003 Census figures by growing to 72 million Americans and representing 20% of the total United States population.<sup>13</sup> In California, these trends are especially significant. In 2003, there were 4.9 million Californians aged sixty-five or older, and by 2020 they are expected to number nine million.<sup>14</sup>

The prevalence of elder abuse in the United States is a serious problem. The incidence of elder abuse is estimated to be as high as one and one-half to two million cases of moderate to severe mistreatment every year.<sup>15</sup> In California, the Attorney General estimates that 200,000 elders are victims of abuse each year.<sup>16</sup> The California Attorney General notes that:

Elder abuse victims often live in silent desperation, unwilling to seek assistance because they unfortunately believe their cries for help will go unanswered and they fear retaliation from their abusers. Many remain silent to protect abusive family members from the legal consequences of their crimes, or are too embarrassed to admit that they have fallen victim to predators. Others fear that no one will believe them—chalking up their allegations to the effects of old age.<sup>17</sup>

Elder abuse takes a devastating toll on its victims. Due to their age, health, disabilities, and limited resources, the elderly are especially vulnerable as targets of abuse. Their deteriorating health may serve to accentuate the problems caused by abuse. As they age, elders experience increased frailties that may impede their ability to carry out daily routines.<sup>18</sup> Many elders experience a deterioration of coordination, vision, hearing, motor skills, and mental responses, as well as other physical and mental impairments.<sup>19</sup> These progressive impairments and

---

11. *Id.*

12. *Id.*

13. *Id.* at 6; see also Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589, 593 (2003) (projecting that the elderly population of the United States will reach "17.7% by 2020 and almost [22%] by 2050").

14. Moskowitz, *supra* note 13, at 601.

15. *Id.*; see also CHAIRMAN OF H. SUBCOMM. ON HEALTH AND LONG-TERM CARE OF THE H. SELECT COMM. ON AGING, 101ST CONG., ELDER ABUSE: A DECADE OF SHAME AND INACTION, at xi (Comm. Print 1990) [hereinafter DECADE OF SHAME].

16. Letter from State of California, Office of the Attorney General to Fellow Californians, *in* CAL. DEP'T OF JUSTICE, A CITIZEN'S GUIDE TO PREVENTING AND REPORTING ELDER ABUSE (2002), available at [http://ag.ca.gov/bmfea/pdfs/citizens\\_guide.pdf](http://ag.ca.gov/bmfea/pdfs/citizens_guide.pdf).

17. *Id.* at 2.

18. CHAIRMAN OF THE H. SUBCOMM. ON HEALTH AND LONG-TERM CARE OF THE SELECT COMM. ON AGING, 102D CONG., 1ST SESS. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY: THE NEED FOR CONGRESSIONAL ACTION 2 (Comm. Print 1991) [hereinafter NEED FOR CONGRESSIONAL ACTION].

19. Robert N. Butler, *Foreword* to ABUSE AND MALTREATMENT OF THE ELDERLY: CAUSES AND INTERVENTIONS, at xi (Jordan I. Kosberg ed., 1983).

the anxiety associated with them make elders more susceptible to abuse, and less likely to recover from it. Studies reveal that abuse is known to hasten the early death of the elderly.<sup>20</sup>

Matters are made worse for elderly victims of abuse when one considers who is most likely to prey on them. As noted above, there may be as many as two million incidents of moderate to severe abuse perpetrated against the elderly every year. Of those estimated cases, 87.5% go unreported.<sup>21</sup> More broadly, elder abuse may involve as many as five million seniors, with as much as 84% of all cases going unreported.<sup>22</sup> The most likely reason for this stark underreporting stems from the victim's relationship with the abuser. In one study, "[f]amily members (e.g., spouse, parents, children, grandchildren, siblings and other family members) accounted for . . . [61.7% of] perpetrators in substantiated reports [of elder abuse]."<sup>23</sup> While elders are less likely to experience violent crimes ("murder, rape, kidnapping, and assault"), they are particularly susceptible to crimes "such as robbery, intimidation, vandalism, forgery, fraud, burglary, and motor vehicle theft."<sup>24</sup> Approximately half of all crimes committed against the elderly are property crimes.<sup>25</sup>

Despite an extensive understanding of the tragic state of elder abuse today, it is remarkable that it only entered the national consciousness very recently. While all states and the District of Columbia have responded in some way, more work must be done nationwide to address this problem.

## II. HISTORY OF AWARENESS AND RESPONSES TO ELDER ABUSE

Recognition of the special circumstances attendant to elder abuse followed the movements that began in the 1960s to address child abuse

---

20. Moskowitz, *supra* note 13, at 604 (citing Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280 JAMA 428, 429 (1998)).

21. See DECADE OF SHAME, *supra* note 15, at xiii; cf. *Society's Secret Shame: Elder Abuse and Family Violence: Hearing Before S. Spec. Comm. on Aging*, 104th Cong. 2 (1995) (opening statement of Sen. William S. Cohen, Chairman, Senate Spec. Comm. on Aging) (estimating rates of reported abuse as low as one in fourteen, suggesting that nearly 93% of elder abuse goes unreported).

22. John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 ELDER L.J. 207, 208 (2003). In 2003, Senator Breaux was the ranking member of the U.S. Special Committee on Aging, and Senator Hatch was a member of that committee as well as the Chairman of the Judiciary Committee.

23. PAMELA B. TEASTER, NAT'L CTR. ON ELDER ABUSE, A RESPONSE TO THE ABUSE OF VULNERABLE ADULTS: THE 2000 SURVEY OF STATE ADULT PROTECTIVE SERVICES 34 (2000), available at [http://www.ncea.aoa.gov/ncearoot/Main\\_Site/pdf/research/apsreport030703.pdf](http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/research/apsreport030703.pdf); cf. NATIONAL ELDER ABUSE INCIDENCE STUDY 7 (1998), available at [http://www.aoa.dhhs.gov/eldfam/Elder\\_Rights/Elder\\_Abuse/AbuseReport\\_Full.pdf](http://www.aoa.dhhs.gov/eldfam/Elder_Rights/Elder_Abuse/AbuseReport_Full.pdf) (utilizing different methodology, finding that family members accounted for 89.7% of perpetrators of elder abuse).

24. Moskowitz, *supra* note 13, at 632.

25. *Id.*

and domestic violence. In 1962, "[Dr.] Kempe and colleagues directed the medical community's attention to the problem of physical child abuse, and coined the term 'battered child syndrome.'"<sup>26</sup> Following this event, and throughout the 1960s, child abuse became a matter of national concern, and by 1967 every state had responded, at minimum, with mandatory reporting laws for physicians.<sup>27</sup> In 1974, Congress enacted the Child Abuse Prevention and Treatment Act, which provided federal incentives for states to develop comprehensive programs addressing child abuse and neglect.<sup>28</sup> Beginning in the 1970s, violence against women, including spousal abuse, began to receive wide public and professional awareness.<sup>29</sup>

Even though elder victims of abuse share many of the same vulnerabilities and characteristics as children and battered spouses, there was no wide national focus in the United States on elder abuse until the late 1970s and early 1980s.<sup>30</sup> In England, an awareness of elder abuse was sparked, at least anecdotally within the medical community, with the publication of reports about "granny bashing" and "granny battering" in the mid-1970s.<sup>31</sup> In the United States, battered elders were not "discovered" until Dr. Suzanne Steinmetz, a domestic violence researcher, gave testimony before Congress that elder abuse existed.<sup>32</sup> In the aftermath of this testimony and other published studies,<sup>33</sup> Congress responded. In 1981, the United States House of Representatives, Select Committee on Aging, issued a landmark report, entitled: *Elder Abuse: An Examination of a Hidden Problem (Hidden Problem)*.<sup>34</sup> This report sought to define the nature of elder abuse and gauge its extent.<sup>35</sup> The report estimated that 4% of American elders (roughly one million elders at the time, or one out of every twenty-five elders) were victims of abuse, most states lacked effective programs to protect elders, and most

---

26. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 82 (1998) (citing C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17, 17 (1962)).

27. Kathryn D. Katz, *Elder Abuse*, 18 J. FAM. L. 695, 704 (1980) (citations omitted).

28. Moskowitz, *supra* note 26. See generally 42 U.S.C. §§ 5101–5107, 5119 (2006) (codifying the Child Abuse Prevention and Treatment Act).

29. Moskowitz, *supra* note 26, at 83.

30. See DECADE OF SHAME, *supra* note 15, at ix–x.

31. Moskowitz, *supra* note 26, at 83; see also G.R. Burston, Letter to the Editor, *Granny-Battering*, 1975 BRIT. MED. J. 592, 592.

32. MARY JOY QUINN, GUARDIANSHIPS OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY 14 (2005).

33. See, e.g., CTR. ON AGING, U. OF MD., THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY 1–3 (Marilyn R. Block & Jan D. Sinnott eds., 1979) (responding to the Administration on Aging's call for investigation into "the incidence of maltreatment of elderly persons").

34. H. SELECT COMM. ON AGING, 97TH CONG., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM (Comm. Print 1981) [hereinafter HIDDEN PROBLEM].

35. *Id.* at xiii–xvii.

significantly, that elder abuse was widespread and largely unreported.<sup>36</sup> Subsequent to this report, Congress incentivized states to address elder abuse through a series of acts and promises of federal funding.<sup>37</sup> The House Subcommittee on Aging also called for federal legislation to fund states in order to assist local programs aimed at preventing elder abuse.<sup>38</sup> Although Congress ultimately did not provide the extensive funding called for in the *Hidden Problem*, by 1985, forty-four states enacted laws specifically aimed at protecting the elderly, many of them undoubtedly doing so as a result and in anticipation of the promised federal funding.<sup>39</sup> Whereas in 1977 no state had any form of specific elder protection,<sup>40</sup> today, all fifty states and the District of Columbia have some type of statute addressing elder abuse prevention.<sup>41</sup> These laws vary widely in their scope and effectiveness, but have been an excellent first step at combating the appalling problem of elder abuse. Still, some laws are better than others, and California could represent the best approach if the changes advocated in this Note are adopted.

### III. NATIONAL SURVEY OF ELDER ABUSE LAW

Every state, as well as the District of Columbia, has some law that protects the elderly and dependent adults from abuse, neglect, and exploitation. However, various jurisdictions use a variety of definitions and choose to protect different groups of vulnerable persons from different types of abuse. Many jurisdictions enacted special laws for elders and vulnerable adults, while others simply added enhancements to their existing assault, battery, neglect, and exploitation statutes.

The following is a national survey and analysis of elder and vulnerable adult abuse statutes. Because different jurisdictions utilize a variety of nomenclatures, this compilation applies certain generalizations. To this end, this Note uses the following definitions: "Physical abuse" refers to any type of battery, assault, or other injury that harms the health or welfare of the victim. "Financial abuse" includes crimes such as exploitation, theft, embezzlement, predatory lending, or

---

36. *Id.* at xiv–xv.

37. Moskowitz, *supra* note 26, at 83–84.

38. HIDDEN PROBLEM, *supra* note 34, at xvii (presenting the proposed Prevention, Identification, and Treatment of Elder Abuse Act, H.R. 769, 97th Cong. (1981), as one option). Although the proposed legislation would have provided funds to states, it was controversial because it mirrored analogous federal child abuse reporting laws, and was seen by some as overly paternalistic and ageist. See Nina Santo, Note, *Breaking the Silence: Strategies for Combatting Elder Abuse in California*, 31 McGEORGE L. REV. 801, 807 n.50 (2000).

39. Moskowitz, *supra* note 26, at 84–85.

40. Richard D. Miller & Richard D. Dodder, *The Abused: Abuser Dyad, Elder Abuse in the State of Florida*, in ELDER ABUSE: PRACTICE AND POLICY 166, 167 (Rachel Filinson & Stanley R. Ingman eds., 1989).

41. See *infra* Part III (compiling elder abuse laws from the fifty states and the District of Columbia).



breach of fiduciary trust. "Caregiver" applies to an institution or person with an affirmative legal duty to provide for the health and well being of the victim. "Vulnerable adult" includes any person over the age of eighteen with a developmental disability or infirmity resulting from old age, as to distinguish from physically able and mentally sound adults and seniors who are fully capable of self-care. Finally, because different jurisdictions utilize varying cutoffs for age, "elder" assumes any age limit of the respective jurisdiction within the accompanying list.<sup>42</sup>

There are twelve jurisdictions whose statutes provide special protection to *all* elders (regardless of disability) and vulnerable adults against both physical and financial abuse. These jurisdictions are California,<sup>43</sup> Florida,<sup>44</sup> Georgia,<sup>45</sup> Hawaii,<sup>46</sup> Illinois,<sup>47</sup> Louisiana,<sup>48</sup>

42. Compare, e.g., CAL. PENAL CODE § 368(g) (West 1999) (defining elders as sixty-five years old or older), with MASS. GEN. LAWS ch. 265, § 13K (2006) (defining elders as sixty years old or older).

43. CAL. PENAL CODE § 368(a)-(k) (West 1999 & Supp. 2009).

44. FLA. STAT. § 784.08 (elderly assault, battery) (2008); *id.* § 825.102 (elder, vulnerable adult abuse, neglect); *id.* § 825.1025 (elder, vulnerable adult sexual abuse); *id.* § 825.103 (elder, vulnerable adult exploitation); *id.* § 782.04 (murder); *id.* § 782.07 (manslaughter); *id.* § 775.0844 (elder white collar crime protection).

45. GA. CODE ANN. § 16-5-20(a), (e) (2007) (elder assault); *id.* § 16-5-21(a), (d) (aggravated elder assault); *id.* § 16-5-23(a), (c) (simple elder battery); *id.* § 16-5-23.1(a), (j) (elder battery); *id.* § 16-5-100 (cruelty against elders); *id.* § 16-8-12(b) (penalties for theft by deception against an elder); *id.* § 16-8-40(a), (c) (robbery against elders); *id.* § 16-9-6 (financial abuse against elders); *id.* § 30-5-8 (penalties for abuse, neglect, or exploitation of an elder or vulnerable adult).

46. HAW. REV. STAT. § 706-660.2 (1993) (imprisonment for crimes against children, elders, or handicapped persons); *id.* § 444-10.7 (Supp. 2008) (enhanced penalties for targeting elders).

47. 720 ILL. COMP. STAT. § 5/9-1(b)(16) (2001 & Supp. 2006) (murder of elder or vulnerable adult); *id.* § 5/12-2 (aggravated assault against elder or vulnerable adult); *id.* § 5/12-4 (aggravated battery against elder or vulnerable adult); *id.* § 5/12-21 (abuse or neglect against elder or vulnerable adult); *id.* § 5/16-1.3 (financial exploitation of elder or vulnerable adult); *id.* § 5/18-1 (robbery against elder or vulnerable adult); *id.* § 5/16G-20 (aggravated identity theft against elder or vulnerable adult).

48. LA. REV. STAT. ANN. § 14:35.2 (2007) (simple battery against elder or vulnerable adult); *id.* § 14:67.21 (theft against elder or vulnerable adult); *id.* § 14:93.3 (cruelty against elder or vulnerable adult) (2004); *id.* § 14:93.4 (exploitation of elder or vulnerable adult); *id.* § 14:93.5 (sexual battery against elder or vulnerable adult).

Massachusetts,<sup>49</sup> Missouri,<sup>50</sup> Nevada,<sup>51</sup> Oklahoma,<sup>52</sup> Wisconsin,<sup>53</sup> and the District of Columbia.<sup>54</sup>

Twenty-two jurisdictions provide special protection to elders with physical and mental disabilities or an inability to protect themselves, and vulnerable adults against both physical and financial abuse. These jurisdictions are Alabama,<sup>55</sup> Arizona,<sup>56</sup> Arkansas,<sup>57</sup> Colorado,<sup>58</sup> Delaware,<sup>59</sup> Idaho,<sup>60</sup> Indiana,<sup>61</sup> Kansas,<sup>62</sup> Maryland,<sup>63</sup> Minnesota,<sup>64</sup> Mississippi,<sup>65</sup> Montana,<sup>66</sup> Nebraska,<sup>67</sup> New Jersey,<sup>68</sup> South Carolina,<sup>69</sup> South Dakota,<sup>70</sup> Tennessee,<sup>71</sup> Utah,<sup>72</sup> Vermont,<sup>73</sup> Washington,<sup>74</sup> West Virginia,<sup>75</sup> and Wyoming.<sup>76</sup>

---

49. MASS. GEN. LAWS ch. 265, § 13K (2006) (physical and financial abuse against elder or vulnerable adult); *id.* ch. 266, § 30(5) (larceny against elder or vulnerable adult).

50. MO. REV. STAT. § 565.180 (2000) (first degree elder abuse); *id.* § 565.182 (second degree elder abuse); § 565.184 (third degree elder abuse); *id.* § 570.145 (financial exploitation of elder or vulnerable adult).

51. NEV. REV. STAT. § 193.167 (2007) (elder abuse penalty enhancements); *id.* § 200.5099 (abuse of elder or vulnerable adult); *id.* § 200.50995 (conspiracy to abuse, neglect, exploit elder or vulnerable adult).

52. OKLA. STAT. tit. 21, § 843.1 (2001 & Supp. 2006) (caretaker abuse against elder or vulnerable adult); *id.* tit. 22, § 991A-16-20 (elder or vulnerable adult protection program).

53. WIS. STAT. § 940.19(6) (2007) (battery of elderly or vulnerable adult); *id.* § 940.285 (vulnerable adult abuse); *id.* § 940.295 (abuse and neglect of nursing home patients); *id.* § 943.20 (theft against vulnerable adult).

54. D.C. CODE § 22-3601 (Supp. 2008) (penalty enhancements for elder abuse); *id.* § 22-933 (criminal abuse against vulnerable adult); *id.* § 22-934 (criminal negligence against vulnerable adult); *id.* § 22-936 (penalties for abuse or neglect against vulnerable adult).

55. ALA. CODE § 38-9-7 (1975 & Supp. 2008).

56. ARIZ. REV. STAT. ANN. § 13-1802 (2001 & Supp. 2007) (theft of vulnerable adult); *id.* § 13-3623 (abuse of vulnerable adult).

57. ARK. CODE ANN. § 5-28-103 (2006).

58. COLO. REV. STAT. §§ 18-6.5-102-103 (2008).

59. DEL. CODE ANN. tit. 31, § 3913 (1997 & Supp. 2006) (violations against vulnerable adults); *id.* tit. 16, § 1136 (2003) (abuse and exploitation of long term care residents).

60. IDAHO CODE ANN. § 18-1505 (1997).

61. IND. CODE § 12-10-3-2 (2008) (defining "endangered adult"); *id.* § 35-42-2-1 (battery); *id.* § 35-46-1-4 (neglect); *id.* § 35-46-1-12 (exploitation); *id.* § 35-46-1-7 (failure to provide support for a parent).

62. KAN. STAT. ANN. § 39-943 (2000) (penalties for unlicensed adult care home operation); *id.* § 21-3437 (vulnerable adult abuse); *id.* § 21-3425 (confined person abuse).

63. MD. CODE ANN., CRIM. LAW § 3-604 (LexisNexis 2002) (first degree abuse and neglect of vulnerable adult); *id.* § 3-605 (second degree abuse and neglect of vulnerable adult); *id.* § 8-801 (exploitation of vulnerable adult).

64. MINN. STAT. §§ 609.224, 609.2325, 609.233, 609.2335 (2006).

65. MISS. CODE ANN. § 43-47-19 (1972).

66. MONT. CODE ANN. § 52-3-825(2) (2007).

67. NEB. REV. STAT. § 28-386 (1995).

68. The New Jersey statute applies broadly to those with a legal duty to care, but is placed in this category because section 2C:44-1 also creates criteria for withholding or imposing a sentence of imprisonment based on elder and disability statutes. N.J. STAT. ANN. § 2C:44-1 (West 2008).

69. S.C. CODE ANN. § 43-35-85 (Supp. 2007).

70. S.D. CODIFIED LAWS § 22-30A-17 (1998) (theft); *id.* § 22-46-2 (1998 & Supp. 2003) (abuse and neglect of vulnerable adult); *id.* § 22-46-3 (exploitation of vulnerable adult).

Two jurisdictions provide special protection to *all* elders (regardless of disability) and vulnerable adults against physical abuse only: Connecticut<sup>77</sup> and Texas.<sup>78</sup>

Ohio provides special protection to *all* elders (regardless of disability) or vulnerable adults against financial abuse only.<sup>79</sup>

New York provides special protection to elders with physical and mental disabilities or an inability to protect themselves, and vulnerable adults against physical abuse only.<sup>80</sup>

Eleven jurisdictions provide special protection to elders and vulnerable adults only as against caregivers with an affirmative duty. These states are Alaska,<sup>81</sup> Iowa,<sup>82</sup> Kentucky,<sup>83</sup> Maine,<sup>84</sup> Michigan,<sup>85</sup> New Hampshire,<sup>86</sup> New Mexico,<sup>87</sup> North Carolina,<sup>88</sup> North Dakota,<sup>89</sup> Oregon,<sup>90</sup> and Virginia.<sup>91</sup>

Finally, two jurisdictions provide special protections to elders only against physical and financial abuse: Pennsylvania<sup>92</sup> and Rhode Island.<sup>93</sup>

71. TENN. CODE ANN. §§ 71-6-117, 71-6-119 (1995).

72. UTAH CODE ANN. § 76-5-111 (2003 & Supp. 2008) (abuse or neglect of vulnerable adult); *id.* § 76-5-112.5 (2003) (endangerment of vulnerable adult).

73. VT. STAT. ANN. tit. 33, § 6913 (2001 & Supp. 2007).

74. Most provisions in Washington require a legal duty, except section 9A.44.100, which specifically targets sexual crimes and has identified as a class of vulnerable victims, frail elders, or vulnerable adults. WASH. REV. CODE § 9A.44.100 (2008).

75. W. VA. CODE § 61-2-29 (2006).

76. WYO. STAT. ANN. § 6-2-507 (2007).

77. CONN. GEN. STAT. § 53a-59a (2007).

78. TEX. PENAL CODE ANN. §§ 22.01, 22.04 (Vernon 2003 & Supp. 2008).

79. OHIO REV. CODE ANN. §§ 2913.02-21, 2913.31, 2913.43 (LexisNexis 2006 & Supp. 2007).

80. N.Y. PENAL LAW §§ 260.25, 260.32, 260.34 (McKinney 2000 & Supp. 2008).

81. ALASKA STAT. § 11.51.200-210 (2006) (first and second degree welfare endangerment of vulnerable adult).

82. IOWA CODE § 235B.20 (2006) (abuse of vulnerable adult); *id.* § 726.8 (2006) (wanton neglect or nonsupport of vulnerable adult).

83. KY. REV. STAT. ANN. § 209.990 (West 2006) (penalties for abuse of vulnerable adult by caretaker); *id.* § 508.100-120 (criminal abuse of vulnerable adult).

84. ME. REV. STAT. ANN. tit. 17-A, § 555 (2006) (endangering the welfare of a vulnerable adult).

85. MICH. COMP. LAWS § 333.21771 (1979 & Supp. 2007) (mistreatment of patient); *id.* § 750.145n (abuse of vulnerable adult by caregiver); *id.* § 750.145o (liability for unlicensed facilities); *id.* § 750.145p (abuse of vulnerable adult by caregiver); *id.* § 750.174a (fraud or coercion of vulnerable adult).

86. N.H. REV. STAT. ANN. 631:8 (2007).

87. N.M. STAT. §§ 30-47-4-6 (2008).

88. N.C. GEN. STAT. § 14-32.3 (2005).

89. N.D. CENT. CODE §§ 12.1-31-07-08 (1997 & Supp. 2007).

90. OR. REV. STAT. § 163.200 (2007).

91. VA. CODE ANN. § 18.2-369 (2004 & Supp. 2008).

92. 18 PA. CONS. STAT. ANN. § 4107 (West 1983 & Supp. 2008) (fraudulent business practices); *id.* § 4120 (West Supp. 2008) (financial fraud); 42 PA. CONS. STAT. ANN. § 9717 (West 2007) (mandatory sentences).

93. R.I. GEN. LAWS §§ 11-5-10-10.4, 11-5-11 (2002 & Supp. 2006).

As the above compilation indicates, there is clearly a unanimous consensus within the United States to specially protect vulnerable adult populations. The various jurisdictions differ as to which communities qualify as vulnerable, and which crimes deserve special attention. The jurisdictions also differ procedurally, some enacting laws with specialized nomenclature distinguishing vulnerable adults for special protections, whereas others have chosen simply to add enhancements to existing assault, battery, exploitation, and neglect laws to achieve the same purpose. However, only twelve jurisdictions (eleven states and the District of Columbia) lead in protecting all elders, regardless of infirmity, with regard to both physical and financial abuse. Almost an equal number of states do not provide any special protection to abuse victims unless the abuser is a legally recognized caregiver. Two-thirds of the states require the elder to be completely dependent, for instance requiring nursing-home care, before special laws intervene.

#### IV. WHERE CALIFORNIA'S LAW FITS

Out of all the jurisdictions, California provides both the broadest protection for the elderly, and also, ironically, the narrowest. Pursuant to California Penal Code section 368(b)(1):

Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, *willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering*, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult *to be injured* . . . is punishable . . .<sup>94</sup>

The misdemeanor analogue to this felony section is identical in all respects except that it is triggered “under circumstances or conditions other than those likely to produce great bodily harm or death,” and the penalties are less severe.<sup>95</sup> The felony provision is ratcheted up where the elder victim suffers great bodily injury,<sup>96</sup> where the victim is seventy-years old or older,<sup>97</sup> or where the victim dies.<sup>98</sup> This law also provides special incremental penalties for perpetrators of financial abuse, including theft, identity theft, and fraud, beginning with stolen property

---

94. CAL. PENAL CODE § 368(b)(1) (West 1999 & Supp. 2009) (emphasis added).

95. *Id.* § 368(c).

96. *Id.* § 368(b)(2)(A) (adding an additional term of three years where victim is sixty-five to sixty-nine).

97. *Id.* § 368(b)(2)(B) (adding an additional term of five years where victim is seventy or older).

98. *Id.* § 368(b)(3)(A)–(B) (adding an additional five and seven years respectively where victim is younger than seventy or seventy and older).

valued at four hundred dollars.<sup>99</sup> Caretakers who abuse their position of trust are likewise dealt with sternly under the Code.<sup>100</sup>

Despite the appearance of California's law as ironclad when it comes to protecting the elderly, its narrow focus on the victim's subjective experience and disregard of an objective analysis exposes it to a significant weakness. At first glance, because there is no requirement for actual physical injury, and because an elder victim could theoretically feign the experience of unjustifiable pain or mental suffering, the law's inherent vagueness seems perfectly crafted to the benefit of prosecutors. Whether such vagueness is unconstitutional appears to have been settled in favor of the vulnerable.<sup>101</sup>

Elder abuse, criminalized by Penal Code section 368, was patterned on and is virtually identical to the child abuse law, California Penal Code section 273a.<sup>102</sup> As such, California courts have indicated that cases interpreting one section are appropriately used to interpret the other.<sup>103</sup>

By giving the word 'willful' its accepted statutory meaning and by applying the 'rule of reason' to the provision as a whole, we think sufficient clarity emerges to 'provide a standard of conduct' to guide the guardian of the child against commission of the offense and to guide the trier of fact in determining guilt. . . . [R]egarding the 'rule of reason' or 'reasonable man test,' 'This type of inquiry has been the rationale for upholding many statutes which by their very nature and subject matter could not be more clear.'<sup>104</sup>

Although Penal Code section 368 has not been challenged for vagueness as to the meaning of "unjustifiable physical pain or mental suffering," given the California legislature's intent as expressed in section 368(a) and other unsuccessful attacks on vagueness grounds, such a challenge is not likely to be successful.<sup>105</sup> When physicians challenged Penal Code section

---

99. *Id.* § 368(d).

100. *Id.* § 368(e) (providing for fines as high as \$1000 and state prison terms as high as four years).

101. *See* *People v. Manis*, 12 Cal. Rptr. 2d 619, 622 (Cal. Ct. App. 1992), *overruled in part on other grounds by* *People v. Heitzman*, 886 P.2d 1229, 1240-41 (Cal. 1994); *see also* *People v. Valdez*, 42 P.3d 511, 516 (Cal. 2002) (upholding constitutionality of Penal Code section 368 against challenge of vagueness as to meaning of "care").

102. *Heitzman*, 886 P.2d at 1237 ("The solution proposed . . . was to establish the same criminal penalties for the abuse of a dependent adult as those found in [California] Penal Code sections 273a and 273d for child abuse. When drafting the new legislation, the bill's author lifted the language of the child abuse statutes in its entirety, replacing the word 'child' with 'dependent adult' throughout." (citations omitted)).

103. *People v. Sargent*, 970 P.2d 409, 415 n.6 (Cal. 1999); *see also Heitzman*, 886 P.2d at 1238 ("It is therefore appropriate to review the decisions interpreting [California Penal Code section 273(a)] to ascertain the reach of the statute at issue here.").

104. *People v. Beaugez*, 43 Cal. Rptr. 28, 33 (Cal. Ct. App. 1965) (citation omitted) (upholding defendant's conviction, and stating that section 273(a) is not void for vagueness).

105. *See* CAL. PENAL CODE § 368(a); *see also* *People v. Curtiss*, 300 P. 801, 804 (Cal. App. Dep't Super. Ct. 1931) (holding in case of teacher whipping pupil that it was a factual question for jury to decide whether the punishment was unreasonable, unnecessary, and cruel).

368 as unconstitutionally vague because they feared wanton prosecution for inflicting pain and suffering on their elder and dependent adult patients in the ordinary course of their medical practice,<sup>106</sup> the court held that “the entire statute passes constitutional muster.”<sup>107</sup> The court clarified that the mens rea required to violate Penal Code section 368 is that of criminal negligence, which for physicians involves “conduct . . . amount[ing] to a reckless, gross or culpable departure from the ordinary standard of due care.”<sup>108</sup> The physicians argued that they should be entitled to an exception because otherwise the law would have a “chilling effect on the delivery of health care.”<sup>109</sup> However, the court reasoned that while overly broad statutes may sometimes constitute a denial of due process, “[n]onetheless, a statute that has some restrictive effect upon protected activities may be valid, if it vindicates important interests of society.”<sup>110</sup> Taking into account “the strong public policy to protect vulnerable adults who are subject to unjustified abuses, the restrictions are minimal in contrast to a vindication of important interests of society,” and as a result, the statute is not overbroad.<sup>111</sup>

The problem with California’s elder abuse law is not that it is susceptible to attack, but rather that it does not provide an objective indicator of injury outside of the caretaker context. The focal point of both the felony and misdemeanor sections is whether the victim of abuse feels “unjustifiable physical pain or mental suffering.”<sup>112</sup> This subjective inquiry is appropriate in some contexts where the victim is able and willing to testify. However, in many common situations, successful prosecution becomes unlikely because there is no objective element. Such an objective element would be best illustrated by a physician testifying that certain injuries caused by the abuser would be consistent with pain and suffering.

## V. NEED FOR MORE PROTECTIVE ELDER ABUSE LAW

There are certain situations that require objective analysis. The first situation presents itself where a victim witness is too stoic or otherwise ashamed to admit that he or she experienced pain or suffering.<sup>113</sup> A second situation highlighting the problem intrinsic in Penal Code section 368 is where a victim witness is recalcitrant due to distrust of the criminal

---

106. *People v. Super. Ct. ex rel. Holvey*, 252 Cal. Rptr. 335, 338 (Cal. Ct. App. 1988).

107. *Id.* at 340 (citing *People v. Smith*, 201 Cal. Rptr. 301, 318–19 (Cal. Ct. App. 1984) (analogizing language and intent of statute to child abuse statute)).

108. *Id.* (quoting *People v. Peabody*, 119 Cal. Rptr. 780, 783 (Cal. Ct. App. 1975)).

109. *Id.* at 338.

110. *Id.* at 341 (citing *Bowland v. Mun. Ct.*, 556 P.2d 1081, 1088 (Cal. 1976)).

111. *Id.* at 341–42.

112. CAL. PENAL CODE § 368(b)(1), (c) (West 1999 & Supp. 2009).

113. See Sandra Conchie, *Elderly Struggle as Family Grab Cash*, N.Z. HERALD, Jan. 20, 2006, available at [http://www.nzherald.co.nz/section/1/story.cfm?c\\_id=1&objectid=10364625](http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10364625).

justice system, or quite commonly as a result of sympathy toward the defendant abuser. As noted above, at least 61.7% of known perpetrators of elder abuse are related to their victims, and often they are the only human contact or source of stability the elder knows.<sup>114</sup> A third example of the shortcoming in the California law presents itself where an elder, due to the injuries sustained or the infirmities of age, develops an inability to recall or communicate an experience of abuse. Another illustration of this third example occurs where the victim dies prior to testifying and without leaving an articulated record of his or her subjective experience of physical pain or mental suffering. In these situations, allowing an expert, such as a doctor or nurse, to testify about the objective evidence of injury, would allow the perpetrator of the abuse to be brought to justice.<sup>115</sup>

#### A. THE STOIC VICTIM

Elderly victims, even when they wish to see their perpetrators receive punishment, may sometimes be too stoic to convey the elements necessary to make a Penal Code section 368 conviction. For example, Carl Parkes was charged with elder abuse for attacking an eighty-one year old woman with a motorcycle helmet.<sup>116</sup> The woman was walking with her cane on Parkes' street when she noticed a copy of the *San Francisco Chronicle* sitting on the defendant's front steps.<sup>117</sup> She took the section of the *Chronicle* that contained a crossword puzzle.<sup>118</sup> The defendant followed her and—without giving her an opportunity to return the newspaper or to apologize—struck her in the head repeatedly with the helmet he had in his hands.<sup>119</sup> As a result of the attack, the victim sustained lacerations to her head requiring the administration of staples at a San Francisco hospital.<sup>120</sup> Assistant District Attorney A. Alan Kennedy was able to convict Parkes, but almost lost the elder abuse count because the victim was reluctant to admit that she was hurt by the assault.<sup>121</sup> Assistant District Attorney Kennedy recalls that it took a great deal of effort to extract from the victim any clear testimony that she experienced any pain.<sup>122</sup> Following the close of the People's case, the

---

114. See sources cited *supra* note 23 and accompanying text.

115. For instance, the medical expert could describe to the jury such objective factual evidence as bleeding, suturing, scars, radiological images, bone fractures, and so forth.

116. Press Release, S.F. Dist. Att'y's Office, Man Charged with Elder Abuse, Assault and Battery for Attacking 81-Year-Old Woman with Motorcycle Helmet (July 25, 2006), available at <http://www.sfdistrictattorney.org/News.asp?id=174>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Interview with A. Alan Kennedy, Asst. Dist. Att'y, S.F. Dist. Att'y's Office, in S.F., Cal. (Mar. 13, 2008) [hereinafter Interview with Kennedy].

122. *Id.*

defense attorney moved the court to dismiss the case under the theory that the victim did not testify that she experienced pain as required under Penal Code section 368(b)(1).<sup>123</sup> Due to the victim's stoicism on the witness stand, the judge nearly granted the motion.<sup>124</sup> However, on close review of the transcript, it became apparent that Assistant District Attorney Kennedy did in fact manage to elicit enough testimony to defeat the defense motion, allowing the matter to go to the jury, which ultimately rendered a conviction.<sup>125</sup>

## B. THE RECALCITRANT VICTIM

More often, elder abuse victims refuse to give testimony altogether. These victims distrust the criminal justice system, fear retaliation from their abuser, or wish to protect their abuser for any number of reasons. An elderly man from Foster City, California, whose son struck him in the head with a hammer, offered up the equity in his home to get his son, Jayantibhai Patel, out of jail.<sup>126</sup> Chief Deputy District Attorney Steve Wagstaffe stated that Patel's bail was set at \$500,000.<sup>127</sup> The apparent motivation for the attack was Patel's belief that his father had to be hospitalized in order for him to be eligible to enter a nursing home.<sup>128</sup> According to Foster City police, Patel struck his father "in the head and possibly the torso with a hammer," then placed the instrument back in a toolbox in the garage, and "waited 1 1/2 hours before calling for help"<sup>129</sup> hoping that his father would lose consciousness before paramedics arrived.<sup>130</sup> The blow left a wound that required seven staples to close.<sup>131</sup> The elder Patel attended his son's bail hearing, and in addition to putting up the property bond for his son's bail, asked the court to release the defendant and let the matter be sorted out by the family.<sup>132</sup>

The Patel case is deplorable; however, such domestic violence against elder victims is entirely too common. In San Francisco, Christopher Coleman, a forty-one year old man with a history of mental illness, struck his seventy-seven year old mother in the head with a hammer on Mother's Day.<sup>133</sup> Coleman believed he heard voices calling

---

123. *Id.*

124. *Id.*

125. *Id.*

126. Melissa McRobbie, *Injured Dad Uses Equity to Bail out Son of Jail*, PALO ALTO DAILY NEWS, Oct. 18, 2007, available at <http://www.dailynewsgroup.com/article/2007-10-18-10-18-07-fc-assault>.

127. *Id.*

128. *Id.*

129. John Coté, *Son Didn't Use His Head in Trying to Put Father in Nursing Home*, S.F. CHRON., Oct. 16, 2007, at D7.

130. *Id.*

131. McRobbie, *supra* note 126.

132. *Id.*

133. Jaxon Van Derbeken, *Son, 41, Charged with Hammering Mother*, 77, S.F. CHRON., May 18, 2006, at B4.



him names and wished for them to stop.<sup>134</sup> He determined that the voices were coming from his mother,<sup>135</sup> so he went into her bedroom and struck her several times in the head.<sup>136</sup> The blows fractured the elder victim's skull requiring hospitalization.<sup>137</sup> Assistant District Attorney Kennedy repeatedly handles similar cases where a victim of elder abuse perpetrated by a family member has refused to cooperate with the prosecution in order to spare the abuser criminal punishment.<sup>138</sup> These cases are tragic and complex, but they are also emblematic of many elder abuse cases in which the victim wishes to protect the perpetrator of abuse.

Another facet of recalcitrant victims stems from their distrust of the criminal justice system; and for good reason. The *Wisconsin State Journal* found that:

Police, jails and courts are poorly equipped to handle elderly suspects and victims. Despite mandatory arrest rules in domestic violence cases, some police officers are reluctant to arrest elder perpetrators.

Doctors and nurses aren't required to routinely ask elders about possible abuse, and some lack the time or training to detect problems.

No domestic violence shelter fully meets the needs of elderly victims in Dane County and most other parts of the state, which can make them reluctant to ask for help.<sup>139</sup>

The *Wisconsin State Journal* offers three poignant case studies illustrating how the system is broken and offers insight into elders' distrust of law enforcement.

Case study [I:]

Madison Assistant Fire Chief Paul Bloom, responding to a call about an elderly man being short of breath, saw bruises as he hooked up an intravenous tube. A granddaughter ended up admitting she'd tied him to the bed "to keep him safe." The victim never spoke up. Bloom reported the incident but believes no one sought charges.<sup>140</sup>

Under California law, this case might have been chargeable. The prosecution would have an uphill battle, but a jury could be convinced that tying an elder to a bed represents a circumstance or condition likely to produce great bodily harm or death.<sup>141</sup> However, the subjective

---

134. *Id.*

135. *Id.*

136. Van Derbeken, *supra* note 133.

137. *Id.*

138. Interview with Kennedy, *supra* note 121.

139. Dean Mosiman, *Afraid to Cry Out: Law Enforcement Resources Tend to Be Focused on Younger Victims and Perpetrators*, *Experts Say*, *Wis. St. J.*, Nov. 8, 2007, at A1, available at <http://www.madison.com/wsj/topstories/index.php?ntid=254564>.

140. *Id.* (emphasis omitted).

141. See CAL. PENAL CODE § 368(b)(1) (West 1999 & Supp. 2009).

element of unjustifiable physical pain and mental suffering would still require the victim's participation in either the felony or misdemeanor prosecutions.<sup>142</sup> Because many elders would be reluctant to testify against their grandchildren, lose their memory and ability to recall facts about the abuse due to the infirmities of aging, or die prior to trial, a prosecutor would not likely be able to elicit testimony about the victim's subjective experience of pain and suffering. With the proposed addition of an objective element, such participation by the elder victim would not be required.

Case study [2:]

An 89-year-old man who lived with his grandson and relied on his caregiving was taken to the hospital for bruising to the chest. The older man confided to a nurse that his grandson hit him, but later claimed he fell, Madison Police Detective Julie Rortvedt said. The home had multiple police calls, the grandson had a criminal record, and Rortvedt sought charges. But the district attorney's office declined for lack of evidence.<sup>143</sup>

This scenario is all too common when the elder victim is dependent upon the abuser. Even if the grandfather did not rely on his grandson for care, it would be difficult for him to betray his own family by giving testimony that could send his grandson to prison. Under California law, a district attorney would likely feel as hopeless in bringing charges as Rortvedt. Of course, if the law were amended to allow objective third-party testimony, this case could be actionable.<sup>144</sup> With the addition of objective criteria to California's elder abuse law, a California district attorney would more likely be able to bring the abuser to justice. The nurse to whom the elder confided could testify as to both the fact of the attack, and the pain and suffering that it could have caused, based on objective evidence such as radiological images, scarring, bruising, sores, and other medical factors.<sup>145</sup>

---

142. *Id.*

143. Mosiman, *supra* note 139 (emphasis omitted).

144. Although it is outside the scope of this Note, this study implicates three cases dealing with evidentiary rules regarding the admissibility of out-of-court statements: *Crawford v. Washington*, 541 U.S. 36, 68 (2004), where the Court found that the testimonial statements of a witness who did not appear at trial were inadmissible, unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination; *Davis v. Washington*, 547 U.S. 813, 828 (2006), in which the Court held that statements made to the police that were necessary to resolve a present exigency were nontestimonial for purposes of the Sixth Amendment Confrontation Clause; and *People v. Cage*, 155 P.3d 205, 207 (Cal. 2007), in which the California Supreme Court found that a statement made to a physician in the course of treating a medical injury was nontestimonial and not subject to the Confrontation Clause of the Sixth Amendment.

145. See *Cage*, 155 P.3d at 218.

### Case study [3:]

A 78-year-old woman didn't resist her rapist but called 911 after the intruder left her Madison home, said Jill Poarch of Meriter Hospital's Sexual Assault Nurse Examiner Program. At the hospital, a special sexual assault nurse examiner met a female police officer who said, "I'm really sorry you were called in. I really think this woman has Alzheimer's or dreamed she was assaulted. Her story just doesn't make sense." The nurse's examination found the victim was hard of hearing and had genital and other physical traumas. A suspect was arrested and convicted of first-degree sexual assault.<sup>146</sup>

Seniors are often uneasy talking about sex, especially sexual abuse.<sup>147</sup> Facing ridicule and disbelief by so-called victim advocates only worsens the already small likelihood that an elder victim of sexual abuse will report it. In a system stacked so heavily against the elderly victim, allowing third-party objective experts to testify that a rape is consistent with unjustifiable physical pain and mental suffering could save the victim a great deal of unnecessary pain and embarrassment and make it more likely for justice to be done.

### C. IMPACTS OF AGING

California law recognizes that elders are especially vulnerable due to the infirmities of age and the looming inevitability of their mortality.<sup>148</sup> For this reason, elder abuse cases take priority on court calendars.<sup>149</sup> Also, thanks to the efforts of Assistant District Attorney Kennedy and Assemblyman John J. Benoit, Penal Code section 1340 was recently amended to allow sick and infirm elder witnesses to testify through the use of two-way video conferencing.<sup>150</sup> The press release for the bill explained its purpose as follows:

[S]eniors in poor health, or who have been relocated by family for their own safety, are often unable to make it to the witness stand. Without their physical attendance at trial the suspect avoids prosecution. Justice is denied . . . and the criminal is free to continue abusing others.<sup>151</sup>

Prior to the passage of this bill, infirm elder witnesses were permitted to create prerecorded video statements in case they died or became

---

146. See Mosiman, *supra* note 139 (emphasis omitted).

147. *Id.*

148. CAL. PENAL CODE § 368(a) (West 1999).

149. *Id.* § 1048(b) (West 2008) ("Notwithstanding subdivision (a), all criminal actions in which . . . a person who was 70 years of age or older at the time of the alleged offense or is a dependent adult, . . . shall be given precedence over all other criminal actions in the order of trial.").

150. Assemb. B. 1158, 2007-2008 Gen. Assem., Reg. Sess. (Cal. 2008) (an act to amend CAL. PENAL CODE § 1340).

151. Press Release, Assemblyman John J.J. Benoit, Assembly Unanimously Approves Benoit Legislation on Elder Abuse Testimony (Jan. 29, 2008), available at <http://republican.assembly.ca.gov/members/a64/Index.aspx?page=PR&pr=4377>.

incapacitated prior to the proceeding.<sup>152</sup> This option, however, was held unconstitutional because it violated a defendant's right to confrontation.<sup>153</sup> The amended Penal Code section 1340 now safeguards a defendant's right to confrontation while recognizing some of the limitations faced by elder victims of abuse.<sup>154</sup>

However, these protections are limited. Although California gives elder abuse cases precedence on court calendars and allows elder victims to testify remotely by way of video conferencing,<sup>155</sup> the elder's participation is still crucial to the prosecution. As explained above, many elders do not or cannot aid the prosecution. Where reliance on their subjective experience of abuse is required, elder victims may not receive justice. To resolve this dilemma, California's elder abuse law should be amended to provide for an alternative objective evaluation of abuse. Such an alternative element would allow successful prosecutions, vindicating society's important interest in protecting the elderly.

## VI. PROPOSED LEGISLATION

In order to resolve this glaring deficiency in the otherwise progressive California elder abuse law, the following amendments should be enacted. Penal Code section 368(b)(1) should be amended to read:

Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, *or willfully causes or permits any elder or dependent adult to sustain a physical injury*, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars (\$6000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years.<sup>156</sup>

152. CAL. EVID. CODE § 1380 (West 1995 & Supp. 2009), *invalidated by* People v. Pirwani, 14 Cal. Rptr. 3d 673, 681 (Cal. Ct. App. 2004).

153. See Pirwani, 14 Cal. Rptr. 3d at 681 (citing Crawford v. Washington, 541 U.S. 36, 38–41 (2004)).

154. See Assemb. B. 1158.

155. See *supra* notes 149–50 and accompanying text.

156. The italicized text denotes the proposed addition to California Penal Code section 368(b)(1). The remainder of the text is section 368(b)(1) as it appears now. CAL. PENAL CODE § 368(b)(1) (West 1999 & Supp. 2009). This proposed objective component is consistent with the legislature's intent and general wording and brings parity between the caregiver and noncaregiver abuser. It is related to section 273.5, which states: "Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or [parent] of his or her child, *corporal injury resulting in a traumatic condition*, is guilty of a felony . . ." *Id.* § 273.5 (West 2008) (emphasis added).

Section 368(c), which applies “under circumstances or conditions other than those likely to produce great bodily harm or death,” and which carries a less severe punishment, should be similarly amended with the same highlighted language.<sup>157</sup>

These changes would add an objective alternative element to the statute, supplementing the existing subjective ones. The statute, as a result, would become more expansive and protective of vulnerable adult populations. With these additions, California would be the only state with both subjective and objective alternative elements, covering all forms of abuse, and every type of abuser—truly setting the gold standard for prosecuting elder abuse.

Fears that such an addition might be too broad or too vague have already been addressed by California precedent.<sup>158</sup> First, both the current version of the law, as well as the proposed amendment, require the mens rea of willfulness on the part of the accused.<sup>159</sup> The current law addresses actions of an individual who “*willfully* causes or permits any elder or dependent adult to suffer.”<sup>160</sup> The amendment proposed in this Note would not change this willfulness requirement. Second, as addressed in the analogous child abuse law, the California courts have spoken to this very sense of uneasiness resulting from vagueness.

By giving the word ‘willful’ its accepted statutory meaning and by applying the ‘rule of reason’ to the provision as a whole, we think sufficient clarity emerges to ‘provide a standard of conduct’ to guide the guardian of the child against commission of the offense and to guide the trier of fact in determining guilt. . . . [R]egarding the ‘rule of reason’ or ‘reasonable man test,’ ‘This type of inquiry has been the rationale for upholding many statutes which by their very nature and subject matter could not be more clear.’<sup>161</sup>

So, for example, if an individual were to *accidentally* allow an elder to exit a vehicle on the street side rather than curbside of the vehicle, and as a result the elder were to become involved in a motor vehicle collision with oncoming traffic, such an individual would not be criminally liable as a result of the changed law, even though arguably that individual permitted the elder “to sustain a physical injury.” The mens rea element of willfulness is retained in the amendment precisely to prevent criminal prosecutions under such circumstances. Further, if the accused in the

---

157. CAL. PENAL CODE § 368(c) (West 1999 & Supp. 2009).

158. See cases cited *supra* note 101 and accompanying text.

159. See *People v. Sup. Ct. ex rel. Holvey*, 252 Cal. Rptr. 335, 340 (Cal. Ct. App. 1988) (holding that a mens rea of criminal negligence is required under California Penal Code section 368).

160. CAL. PENAL CODE § 368(b)(1) (emphasis added).

161. *People v. Beaugez*, 43 Cal. Rptr. 28, 33 (Cal. Ct. App. 1965) (citations omitted) (construing CAL. PENAL CODE § 273a (West 2008)). As discussed in Part IV, California’s elder abuse statutes were directly modeled off of California Penal Code section 273a, among others. See *supra* Part IV. As a result, this same analysis would be directly applicable to elder abuse.

above example were a caretaker, rather than a noncaretaker, the current version of the law which has stood up to vagueness challenges would control irrespective of the amendments. The portion of California's elder abuse law that covers caretaker abuse already contains an objective element. The law states, in pertinent part, that:

Any person . . . having the care or custody of any elder or dependent adult, [who] *willfully causes or permits the person or health of the elder or dependent adult to be injured*, or willfully causes or permits the elder or dependent adult *to be placed in a situation in which his or her person or health is endangered*, is punishable . . .<sup>162</sup>

The proposed language is merely intended to nullify the dubious distinction between caretaker and noncaretaker imposed abuse against the elderly. Because the California legislature recognizes that elders are a uniquely vulnerable class deserving of special protections, the proposed amendments realign the law with the legislature's intent and findings. Ultimately, California has entrusted triers of fact to evaluate defendants' states of mind and the totality of circumstances while applying the "rule of reason" to reach their verdicts.<sup>163</sup> Incidental or accidental inflictions of injury upon elders that are not willful should not be prosecuted under the law. However, as with all laws that protect vulnerable individuals, that by their nature and subject matter cannot be clearer, the fate of the accused is left to prosecutorial discretion and the reasonableness of the trier of fact. Some slight inhibitions on protected activities might be affected by this proposed change, and it could cause certain actors in society to exercise greater caution around vulnerable adults, but as the court stated in *People v. Superior Court ex rel. Holvey*, "a statute that has some restrictive effect upon protected activities may be valid, if it vindicates important interests of society."<sup>164</sup> Certainly, society has such an interest in protecting the elderly.

### CONCLUSION

Elders represent an especially vulnerable community. As America continues to gray, they will become an increasingly visible segment of the nation. If crimes against the elderly continue to be perpetrated at a constant rate, and if underreporting of those crimes remains as high as it is today, the ramifications will be disastrous. Although it took far too long, every state has recognized that providing special protections to the elderly and prosecuting their abusers is necessary. In order to restore elderly victims' trust in the criminal justice system and bring justice to those who abuse vulnerable adults, tough and comprehensive penal codes should be enacted throughout the United States. With the simple

---

162. CAL. PENAL CODE § 368(b)(1) (emphasis added); see also *id.* § 368(c).

163. *Beaugez*, 43 Cal. Rptr. at 33.

164. 252 Cal. Rptr. at 341 (quoting *Bowland v. Mun. Ct.*, 556 P.2d 1081, 1088 (Cal. 1976)).

amendments proposed in this Note, California could achieve the gold standard for protecting vulnerable adults and prosecuting their abusers.